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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1594

NORTH WASHINGTON NEIGHBORS, INC., ET AL.,
Petitioners,

v.

DISTRICT OF COLUMBIA, A Municipal Corporation, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

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NO._____

NORTH WASHINGTON NEIGHBORS, INC., ET AL.,

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v.

DISTRICT OF COLUMBIA, A Municipal Corporation, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE DISTRICT OF COLUMBIA COURT OF APPEALS

North Washington Neighbors, Inc., et al., petitioners, appellees below, respectfully pray that a writ of certiorari issue to review the judgment of the District of

Columbia Court of Appeals entered on December 23, 1976, in District of Columbia, et al. v. North Washington Neighbors, Inc., et al., No. 10301.

OPINIONS BELOW

The opinion of the Court of Appeals in the instant case is reported at 367 A.2d 143 (1976) and is reprinted in the Appendix, infra, p. A-1.

The Order of the Superior Court of the District of Columbia, Civil Division, in the instant case, is unreported and is reprinted in the Appendix, infra, p. A-13.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was initially entered on December 23, 1976. Petitioners' Petition for a Rehearing or Hearing En Banc was timely filed on January 26, 1977, and was denied by the District of Columbia Court of Appeals on March 8, 1977 (Appendix, infra,

p. A-59). On March 30, 1977, the District of Columbia Court of Appeals filed an order granting a stay of mandate for a period of 30 days to permit filing of a petition for a writ of certiorari. On April 29, 1977, the District of Columbia Court of Appeals filed an order granting a further stay of mandate to and including May 16, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3).

QUESTION PRESENTED

Did the District of Columbia Court of Appeals deny Petitioners their constitutional right to due process by reversing certain findings of fact made by the trial judge without complying with the standards for reversal required by the District of Columbia Code.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in part:

> No person shall. . .be deprived of life, liberty, or property, without due process of law. . .

STATEMENT OF THE CASE

Property owners in the District of Columbia have been required by law since 1896 to connect, at their own expense, to the city water system in order to fulfill their residential water needs. D.C. Code (1973) §6-401 through 6-404. Each owner must purchase and install, under the supervision of the District, water service pipes running from the residence to the public water main located beneath the nearest city street.

Petitioners are members of a class of approximately 1,250 property owners whose water service pipes became broken under the street, sidewalk, or adjoining public space in the District of Columbia (hereinafter "public space") between January 1, 1971 and December 10, 1975; who were required by the District to pay all of the costs of repair

of water service pipes under the public space as well as the cost of excavating the public space and resurfacing it, under compulsion from the District that their water would be cut off or that they would be prosecuted for violation of the City Police Regulations; and who sued to secure reimbursement of the cost and expense of the same.

The Trial Court of the District of Columbia certified this class under Rule 23(c) of the Civil Rules of the Superior Court on December 13, 1974. A second class consisting of the property owners whose water service pipes might be broken in the future was also certified at the same time.

While the case was pending before the Court of Appeals, the City Council of the District of Columbia passed a law (D.C. Law 1-98, The Water and Sewer Repair and Compensation Act of 1976 - effective March 29,

1977) which provides that:

> (1) The District of Columbia shall be responsible for the repair and maintenance of water service pipes and building sewers connecting lots with water mains and the public sewer; and
>
> (2) it shall compensate property owners for such repairs made in the three years prior to the date of enactment.

The effect of this statute is to compensate members of petitioners' class who made repairs after March 29, 1974. The Act does not compensate in any way the bulk of petitioners' class (over 800 persons) who made repairs between January 1, 1971 and March 29, 1974. Because the statute does not affect these petitioners in any way, they are left without relief.

The case was tried, without a jury, on November 5-6, 1975. On December 10, 1975,

the trial court entered its order. (App. A-13 to A-58.)

The trial court found that the District lacked any statutory or regulatory authority to compel property owners to repair or replace broken or leaking water pipes; that even if the rules and regulations relied upon by the District did provide such authority they were void because they were not promulgated in accordance with the Administrative Procedure Act (D.C. Code (1973), §1-1501 et seq.); and that in any event the District was liable in tort to property owners whose pipes were broken because the District had proximately caused such breaks by allowing increased traffic on the streets above the affected pipes causing them to break.

The trial court's order specifically:

> (1) voided the District's practice, action, and regulations requir-

ing property owners to repair and replace water service pipes broken or leaking under public space;

(2) voided certain regulations of the District of Columbia insofar as they required property owners to repair or replace water service pipes broken or leaking under public space and to incur the related expenses;

(3) awarded judgment in favor of each member of the petitioners' class who had suffered a break or leak in their water service pipes under public space, between January 1, 1971 and December 10, 1975, and who had incurred the expense of repair or replacement and related expenses; and

(4) issued a permanent injunction requiring the District to repair and replace, at the District's expense, all broken or leaking water service

pipes under public space existing at the time of the order or occurring in the future.

The trial court's order was supported by numerous findings of fact (Appendix A-18 to A-42) and conclusions of law (Appendix A-43 to A-50).

On appeal, the Court of Appeals reversed (December 23, 1976). In order to reach its conclusions for reversal, the Court made five separate factual findings contrary to those found by the trial court. It did so, however, without meeting the statutory test for reversing lower court findings of fact.

Petitioners filed a Petition for a Rehearing or Hearing En Banc. In urging the Court of Appeals to reconsider its ruling, Petitioners point out that the Court of Appeals acted in violation of D.C. Code (1973) §17-305(a) which governs Appellate

court review of findings of fact of a trial court in cases without a jury. The section requires that:

> When the case was tried without a jury the court may review both as to facts and the law, but the judgment may not be set aside except for errors of law unless it appears that the judgment is plainly wrong or without evidence to support it.

The Court of Appeals in the instant case did not meet the standard imposed by §17-305(a), and thereby violated Petitioners' federal constitutional right to due process.

The Petition for Rehearing or Hearing En Banc was denied by the Court in all respects. (Appendix p. A-59.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals overturned the decision of the trial court and denied Petitioners the relief which they had been granted by the lower court. Each and every ground for reversal which the Court of Appeals announced depended in the first instance

upon changing one or more of the fact findings made by the trial court. [The reversed fact findings are listed below.] The critical act of the Court of Appeals complained of here is the mass reversal of five findings of fact.

That act of the Court of Appeals (the reversal of five fact findings) was a direct violation of the D.C. Code (1973) §17-305(a) governing appellate court review of factual findings, and it was a denial of due process guaranteed to D.C. citizens by the Fifth Amendment to the Constitution.

The Court of Appeals exceeded the allowable scope of review in those five instances by making factual findings contrary to the Superior Court, and by failing to show that those findings were "plainly wrong or without evidence to support (them)" as §17-305 (a) requires.

The five instances relate to: (a) a fac-

tual distinction between "water service pipes" and "water pipes" (Compare Appendix A-19 with A-4); (2) a question of who actually paid the costs of street excavation (Compare Appendix A-27 with A-6); (3) a question of proximate cause between the increase in the amount and weight of vehicular traffic and breaks in the water service pipes (Compare Appendix A-26 with A-10); (4) a factual question of whether the District's policy requiring property owners to pay the cost of repair of broken water pipes was "rulemaking" in violation of the D.C. Administrative Procedure Act (Compare Appendix A-37 with A-8); and (5) a question of whether the District had fixed the water service pipes of some property owners free of charge while all others had to pay (Compare Appendix A-28 with A-3).

Looking at one of these instances in some detail will illustrate the Court of Appeals' actions.

The Superior Court's factual finding No. 12 was:

> There is a proximate cause relationship between the increase in amount and weight of the vehicular traffic of all kinds and the breaks and leaks in the water service pipes. The overwhelming cause for the breaks and leaks is the utilization of public space by augmented traffic that damages and breaks the water service pipes.

The above statement is an unambiguous factual finding by the trial court based on expert and other testimony presented at the trial.

The Court of Appeals, without any contrary testimony or any reason to conclude that the lower court finding was clearly wrong, reversed. This one reversal of the trial court's findings of fact and four similar reversals violate the D.C. Code (1973) §17-305(a).

The Court of Appeals is not authorized to try facts anew and substitute its findings even if it would have drawn different conclusions than the trial court, if there was evidence to support the finding below. United States ex rel. State of Pa. v. McDevitt, 195 A.2d 740, 741 (D.C.App., 1963). See also Patterson v. Patterson, 188 A.2d 300 (1963). The Court of Appeals is also "precluded from retrying factual issues under the guise of appellate review". Pappas v. Accountants, Inc., 179 A.2d 721, 722 (1962); Haslen Sales Corporation v. Washmobile Corporation, 184 A.2d 855, 856 (1962).

The rule in the District of Columbia is clear. Trial court findings of fact are deemed to be "conclusive" on appeal. Lee Washington, Inc. v, Washington Motor Truck Transportation for Employees Health

& Welfare Trust, D.C.App. 310 A.2d 604,. 606 (1973). The Court of Appeals in Richardson v. J.C. Flood Co., 190 A.2d 259, 261 (1963) noted that it had "frequently had occasion to state that, except for errors of law, we are expressly forbidden to set aside a judgment of the trial court sitting without a jury, unless the judgment is plainly wrong or without evidence to support it". See also Reese v. Crosby, 280 A.2d 526, 527 (1971); $3,265.28 in United States Currency v. District of Columbia, 249 A.2d 516, 518 (1969); Ashlen v. Ashlen, 179 A.2d 905, 906 (1962); Goldberg v. Stouck, 76 A.2d 785, 786 (1950).

The District of Columbia court system was reorganized in 1970 (Public Law 93-358). Previously, parties in the District had the right to appeal from the District Court of Appeals to the Federal Circuit Court of Appeals for the District of Columbia. Under

the reorganization, the right to appeal to the Federal Circuit Court was ended and the D.C. Court of Appeals became the highest court in the District. (See Public Law 93-358, §11-102.) The standard for review of findings of fact in the D.C. Court of Appeals remained unchanged, however. [See D.C. Code, 1967, §17-305(a) and D.C. Code 1973, §17-305(a).] Lee Washington, Inc. v. Motor Truck, supra, demonstrates that the Court of Appeals has, subsequent to the reorganization, reaffirmed the standard set forth in D.C. Code (1973) §173-305(a).

What has changed is the finality of a decision made by the D.C. Court of Appeals. This Court is now the only source of relief for petitioners who have been denied due process by the Court of Appeals as has happened here.

The District of Columbia standard for

Appellate Court review of findings of fact is typical of that followed in jurisdictions throughout the country. No appellate court is authorized to retry the facts found below. The views most often taken by the state appellate ocurts are that a finding of fact made by a court acting without a jury cannot be reversed on appeal unless it is clearly against the weight or preponderance of the evidence, e.g., Zarzecki v. Hatch, 79 N.W.2d 605 (1956) or it is not supported by any substantial evidence, e.g., Dilliard, et al. v. McKnight, et al., 209 P.2d 387 (1949) or it is not supported by any reasonable view taken of the evidence, e.g., Abele, et al. v. Dietz, 45 N.E.2d 970 (1942).

The instant case represents a question of national significance because the standards for appellate court review of factual

findings followed throughout the country are similar to the District of Columbia standard in D.C. Code (1973) §17-305(a). This Court must act to prevent future inequity and denial of due process arising when the highest courts in the several states or the District of Columbia misuse their powers and overturn lower court findings of fact in the face of specific statutes to the contrary.

In the Federal court system, Rule 52(a) imposes a standard for review similar to that imposed by D.C. Code (1973) §17-305(a). The Federal rule states that:

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

This Court in applying the "clearly erroneous" standard, has stated that the question for the appellate court under Rule

52(a) is not whether it would have made the findings the trial court did, but whether "on the evidence [it] is left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 396, 68 S.Ct. 525, 92 L.ed 746 (1948). See also United States v. National Assoc. of Real Estate Boards, 339 U.S. 485, 495-6, 70 S.Ct. 711, 717, 94 L.ed 1007 (1950); Commissioner of Internal Revenue v. Duberstein, 363 U.S. 278, 289-91, 80 S.Ct. 1190, 1198-99, 4 L.ed 2d 1218 (1960).

The standards are clear in the Federal court system, in the state court system, and in the District of Columbia. What this Court must do is to rule in this case so that all future litigants will know what remedy they have when the court of last resort exceeds its legal scope of review of findings of fact below.

CONCLUSION

In the absence of review by this Court, the District of Columbia Court of Appeals will have successfully deprived Petitioners of due process of law.

Petitioners respectfully urge that the writ of certiorari issue.

Respectfully submitted,

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APPENDIX

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 10301

DISTRICT OF COLUMBIA, A Municipal Corporation, et al., APPELLANTS,

v.

NORTH WASHINGTON NEIGHBORS, INC., et al., APPELLEES.

Judgment entered
~~date~~ Dec 23, 1976

Appeal from the Superior Court of the District of Columbia

(Argued April 22, 1976 Decided December 22, 1976)

E. Calvin Golumbic, Assistant Corporation Counsel, with whom *Louis P. Robbins*, Acting Corporation Counsel at the time the brief was filed, and *Richard W. Barton*, Assistant Corporation Counsel, were on the brief, for appellants.

Gilbert Hahn, Jr. for appellees.

Before KELLY, KERN and GALLAGHER, *Associate Judges.*

KERN, *Associate Judge:* The District of Columbia appeals from an order (1) permanently enjoining it from enforcement of certain rules and regulations regarding the repair of water pipes by the residents of the District, (2) declaring it liable for the expense, in the future, of repairing such pipes, and (3) directing it to reimburse residents who within three years of the date of filing of

the complaint in this case had incurred expense for such repairs. This case was earlier before us in *District of Columbia v. North Washington Neighbors, Inc.*, D.C.App., 336 A.2d 828 (1975), where we reversed the trial court's decision to grant a preliminary injunction on the ground that the plaintiffs had an adequate remedy at law.

The appellees represent (1) a class of plaintiffs whose water pipes have broken in the past and (2) a class of plaintiffs whose pipes may break in the future.

The basic issue in the case is whether the District has the authority to require individual citizens to bear the cost of repair of the pipes connecting their individual water systems to the District's water mains when they break or whether the District itself must bear that cost, eventually passing it along in the form of higher user rates to all consumers of water within the city.

The trial court's order, entered after an evidentiary hearing, is a detailed document which essentially found that the rules and regulations relied upon by the District did not, by their terms, convey authority to compel repair of the pipes by the individual property owners using them; that, even if those rules and regulations did supply such authority, they were void because they were not promulgated in accordance with the Administrative Procedure Act, D.C. Code 1973, § 1-1501 *et seq.* (hereinafter DCAPA); that, even if the rules and regulations conformed to the DCAPA, they violated the Equal Protection and Due Process clauses of the Constitution because the District itself had on several occasions in the past repaired the pipes of individual property owners when "there is no other way of getting work done" (Record at 173); and that, in any event, the District was liable under a tort theory to the individuals whose pipes had broken because the District itself had proximately

caused such breaks by the improper control of traffic on the streets above the pipes and the inadequate construction of the streets and the pipes so as to withstand subsequent wear and tear.

For the reasons set forth below, we reverse the order of the trial court and hold that the District of Columbia has authority, under the applicable statutes and regulations, to compel property owners to repair the water pipes which connect their individual vater systems to the District's water mains and that the District of Columbia is not liable in tort for breakage or other damage occurring to these pipes.[1]

It is undisputed that the District of Columbia Code places upon individual property owners the sole responsibility for connecting *initially* their own water systems with the *public* water and sewer main by means of underground water pipes, "the work to be done in accordance with the regulations governing plumbing and house drainage." *See* D.C. Code 1973, §§ 6-401 to 6-404. Although these particular provisions of the Code do not specify that the responsibility for *repairs* of the water pipes once they have been constructed and connected to the public water system remain with the property owner. D.C. Pol. Reg. Art. 23, § 5 provides:

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[1] We do not deem it necessary to address at length the constitutional claims raised by the appellees. In our view there are no equal protection or due process issues presented here because there has been no showing of invidious discrimination by the District in favor of some citizens at the expense of others. The record reflects that the action taken by the District of Columbia, pursuant to D.C. Code 1973, § 5-313, in repairing the pipes of a half-dozen property owners who were either unable or unwilling to do so was within the proper scope of its police power to effect in order to preserve the general health and welfare of the community.

> No occupant of premises into which water has been introduced shall permit the same to run or waste unnecessarily from *any water pipe* . . . or, if any water pipe . . . be found leaking, out of repair, or inoperable, and *said occupant, owner* or agent of the premises *shall refuse or neglect to have the necessary repairs made*, after due notification by . . . Water Operations Division . . . the supply may be terminated to said premises until satisfactory repairs or arrangements have been made to prevent such waste or unlawful use; and, in addition, the person so offending shall be liable to the fine provided in these regulations. (Emphasis added.)

This Regulation in our view places on the property owner or occupant who receives water from the city the duty of repairing "any water pipe" so as to avoid water waste and provides the District with two remedies against one who fails to accept that duty—termination of water service and a fine.

The trial court in its order drew a distinction between the term "water service pipes" (being those which run under public property) and the term "water pipes" (being those which run under private property). The trial court concluded from this distinction that the Police Regulation was intended to apply solely to leaks occurring on private property *only* since the term "water pipes" is used in Section 5 of Article 23. The record reflects (Record at 48-9) that the correct distinction to be drawn is between the water main distributing water throughout the city and the pipe running from the main to the plumbing system inside each structure. Moreover, the Regulation refers to "any water pipe," and we see no reason why the term does not mean

exactly that—*any* water pipe running between the main and the individual's plumbing system.

We note that D.C. Pol. Reg. Art. 23, § 5 is not the only expression contained in the regulations of the District of Columbia that the property owner shall himself be responsible for keeping his water pipes in good repair. The Model Plumbing Code, § 105.3, provides that plumbing systems must be maintained in a safe and sanitary condition "by the owner or his authorized agent." We cannot agree with the trial court that this pronouncement applies *only* to buildings constructed subsequent to the effective date of the Model Plumbing Code in 1972. The City Council, adopting the Code, expressly provided that it should govern "the installation, maintenance and repair of *all* plumbing work in the District of Columbia. Title 5C-2, DCRR No. 72-19 (Appendix A § 1) (emphasis added).

In addition to these regulations specifically directed to water pipes and plumbing, the District is granted sweeping remedial and enforcement authority in D.C. Code 1973, § 5-313. This section provides:

> *Whenever* the owner of any real property in the District of Columbia *shall fail* or refuse . . . *to correct any condition which exists on or has arisen from such property in violation of law or of any regulation made by authority of law*, . . . the Commissioner of the District of Columbia may, and he is authorized to, cause such condition to be corrected; *assess the cost of correcting such condition . . . as a tax against the property . . . and collect such tax . . . .* (Emphasis added.)

This statute, read in conjunction with D.C. Pol. Reg. Art. 23, § 5[2] and provisions of the Model Plumbing Code, confers on the District authority to order property owners to repair leaking water pipes and enforce such authority by fine or by termination of the property owner's water service, or, in the discretion of the Mayor and his representatives, to repair the pipes and assess the cost of such repair against the property served. Although none of the applicable statutes or regulations specify that the property owner must bear the costs of excavation,[3] refilling of excavation, and resurfacing of streets, we think that such result is reasonable because those costs are clearly incidental to the cost of repairing the pipes.

The trial court held that D.C. Pol. Reg. Art. 23, § 5 was invalid because it was not issued in compliance with the terms of the DCAPA which required certain procedures of publication before a regulation was deemed in force and effect. We disagree with this conclusion. The requirement of the DCAPA that regulations *already in existence*, such as the regulation here pertinent, be published was met by the July 27, 1970 Special Edition of the District of Columbia Register, which incorporated

[2] Appellees question the existence of *any statutory* authorization at all for the promulgation of this particular regulation. However, D.C. Code 1973, § 1-226 authorizes "reasonable and usual police regulations" and D.C. Code 1973, § 43-1503 empowers the city to supply its residents with water and "make all laws and regulations for the proper distribution" of such water.

[3] The record reflects (Record at 50) that the District, as a practical matter, bears the burden of the initial excavations since the location of the water leak can only be determined by digging up the street under which the pipe runs to the main.

the District of Columbia Police Regulations. *D.C. Human Relations Commission v. National Geographic Society*, 154 U.S.App.D.C. 255, 257, 475 F.2d 366, 368 (1973). Furthermore, there is no merit to the appellees' contention that regulations existing prior to the time the power to issue police regulations was transferred from the Commissioner (now Mayor) to the City Council must be reenacted by the Council in order to maintain their validity. Reorganization Plan No. 3 of 1967 merely effected a transfer of the power to make rules and regulations *prospectively*. There is nothing in the Plan to indicate that the extant slate of prior rules and regulations was to be wiped clean, and, in fact, Congress expressly provided that regulations in existence prior to reorganization should retain "the same effect as if the reorganization had not been made." 5 U.S.C. § 907(a).[4]

We must also disagree with the conclusion of the trial court that the letter of July 21, 1971, to Senator McGovern,[5] in which the District outlined its reading of the

[4] 5 U.S.C. § 907(a) provides, in relevant part:

> A statute enacted, and a regulation or other action made, prescribed, issued, granted or performed in respect of or by an agency or function affected by a reorganization, has, except to the extent rescinded, modified, superceded, or made inapplicable by or under authority of law or by abolition of a function, the same effect as if the reorganization had not been made.

[5] The letter provides in pertinent part:

> Basically, a property owner has a duty to provide at his own expense for the connection of his lot to a water main . . . Section 105-3 of the 1967 Plumbing Code . . . provides that plumbing systems shall be maintained in a safe and satisfactory condition by the property owner . . . Section 5 of Article 23 of the Police Regulations . . . authorizes the termination of water services to . . .

regulations relevant to repair of water pipes, was in effect "rulemaking" within the meaning of the DCAPA and as such failed to comply with that Act. While the definition of a "rule" under the DCAPA is certainly broad and includes any "statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy," D.C. Code 1973, § 1-1502(6), we do not believe that whenever the District merely *describes* the effect of an existing rule or regulation, as was the case here, it has issued a "statement . . . designed . . . to interpret" within the meaning of the definition of the term "rule." The DCAPA envisioned rulemaking as a quasi-legislative process, and, where the government agency performs no legislative function but only describes or refers to the regulation as it is written, the procedural formalities of the APA are unnecessary. Our prior cases, *District of Columbia v. Green*, D.C.App., 310 A.2d 848 (1973), and *Junghans v. Department of Human Resources*, D.C.App., 289 A.2d 17 (1972), are inapposite; they involved changes in existing rules and regulations which were legislative in nature and clearly within the ambit of the rulemaking provisions of the DCAPA.

The trial court also found in its order now on appeal that breaks in the water pipes were proximately caused by the negligence of the District of Columbia government and therefore concluded upon a theory of tort that the District was responsible to individual property owners for the cost of repair they had

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premises where there is water waste until satisfactory repairs . . . have been made . . . of the source of the waste by the occupant, property owner or the authorized agents of the premises.

incurred.[6] This finding of proximate cause seems to have rested on evidence showing that the District "prescribe[s] the standards for streets and the amount and weight of traffic that flows over them and the stresses to which the streets may be subjected" and that "[t]he original systems and standards of constructions for public streets, mains and water service pipes in the 19th Century and the early part of the 20th Century did not plan for the present day's stresses and strains on street use." The theory urged by appellees, and apparently accepted by the trial court, was that the District was liable in tort to city property owners because it allowed such an excessive flow of traffic over the city streets as to cause the water pipes below the streets and running to individual lots to break under the traffic's weight.[7]

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[6] Appellees had at the beginning of trial (Record at 48) stated their theory of the case that the city was responsible for any break in a water pipe under public space, *viz.*, the street. At the conclusion of the evidence appellees asserted (Record at 326-28, 331) that they had proved lack of due care on the part of the District and causation of the breaks in the pipes by traffic flow over city streets.

[7] The tort theory advanced by appellees raises a substantial question of sovereign immunity. The issue was not briefed or argued by the parties on appeal, but since sovereign immunity is a jurisdictional issue, an appellate court is obliged to consider it, even on its own motion if need be. In the District of Columbia, sovereign immunity survives for "discretionary" but not "ministerial" acts of the government. *Wade v. District of Columbia*, D.C.App., 310 A.2d 857 (1973) (en banc). This distinction between discretionary and ministerial functions was influenced by similar distinctions drawn under the Federal Tort Claims Act. *See id.* at 861. In cases brought under the federal Act, the planning of a highway has been held to be a discretionary function of government and therefore immune from liability. *Mahler v. United States*, 306 F.2d 713, 723 (3d Cir. 1962); *Daniel v. United States*, 426

The theory of tort liability adopted by the trial court, *viz.*, that the District's specifications for constructing the city streets and the water pipes were insufficient to withstand the weight of the traffic which now flows over those streets, is in our view not supportable for several reasons.

First, the courts have consistently held that notice of the defect alleged, either actual or constructive, is an element of the case which must be pleaded and proved in a tort action against the District. *Hackett v. District of Columbia*, D.C.App., 264 A.2d 298, 299 (1970); *Elgin v. District of Columbia*, 119 U.S.App.D.C. 116, 121 n.5, 337 F.2d 152, 157 n.5 (1964). We see nothing in the record, and certainly nothing in the trial court's order, to indicate that this requirement was fulfilled here. Likewise, there is nothing in the record to show that the appellees complied with D.C. Code 1973, § 12-309, which states:

> An action may not be maintained against the District of Columbia for unliquidated damages to person or property unless, within six months after the injury or damage was sustained, the claimant, his agent, or attorney has given notice in writing to the Commissioner of the District of Columbia of the appropriate time, place,

F.2d 281 (5th Cir. 1970). Furthermore, the Supreme Court has indicated that the exercise of discretion which enjoys tort immunity "includes determinations made by executives or administrators in establishing plans, specifications or schedules of operations." *Dalehite v. United States*, 346 U.S. 15, 35-36 (1953). We believe that the municipal acts complained of here, which involve the designing of streets and the control of the flow of traffic over them, were discretionary in nature under the standards developed in the above cases.

> cause, and circumstances of the injury or damage.

Finally, we question whether the evidence offered by appellees before the trial court was sufficient to establish that acts or omissions by the District were the *proximate cause* of the damage to the water pipes. Aside from the fact that the District can only indirectly control the flow of traffic over city streets, the statistics regarding increased flow and weight of traffic which were introduced by appellees do not reflect a direct relationship to pipe breakage that in fact occurred in this case. Indeed, appellees' expert acknowledged (Record at 111) that whether a pipe breaks "is the function of a lot of variables . . . things you can't predict very well." Among these variables (Record at 112-13), were the type of soil surrounding the pipe, the way the trench had been made, where the pipe was laid in the trench, the kind of back-fill in the trench after the laying of the pipe, the quality of the pipe material and pipe joints, and whether the surface of the road above the pipe was uniformly smooth. We could not uphold a finding of proximate cause on the basis of such evidence.

The record in this case reveals—and we are well aware—that the individual property owner who is suddenly called upon to bear the often quite significant cost of repairing his water pipes bears a severe hardship. However, we are unable to conclude that the District *lacks the authority* under the applicable statutes and regulations to impose this burdensome cost upon the property owners or that the District can be held liable in tort for the cost of repair of the pipes. As the trial court conscientiously noted in its order, the repair of the pipes could be more equitably effected by spreading the cost among all the users of water in the city in the form of

higher consumer rates. In the final analysis this case reflects the kind of inequitable situation which is suitable for legislative rather than judicial relief.*

Reversed and remanded.

* Apparently legislative efforts are now underway to alleviate the financial burden now existing upon individual property owners as the result of the District's present regulations.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

NORTH WASHINGTON NEIGHBORS, INC. ET AL.	:	
Plaintiffs	:	
v.	:	C.A.No. 7481-74
THE DISTRICT OF COLUMBIA, ET AL.	:	
Defendants	:	

ORDER

This cause came on to be heard on the Complaint of North Washington Neighbors, Inc. and 56 other named plaintiffs, as a class action, against the District of Columbia and others. This Court, on December 13, 1974 certified the action as a Class Action under Rule 23(c) of the Civil Rules of this Court. Answer to the complaint was filed by defendants on December 26, 1974.

I. POSITIONS OF THE PARTIES

The plaintiffs seek the following relief:

One: To recover monies paid by the first class represented by plaintiffs for the repair and replacement of "water service pipes" under any public space in the District of Columbia during the period January 1, 1971 to the date of judgment, with interest at 6% from the date of incurring the expense to the date of payment.

Two: For a preliminary and permanent injunction to enjoin the defendants from requiring property owners in the District of Columbia to pay or incur any expense hereafter in connection with the repair or replacement of water service pipes under any public space in the District of Columbia; and to require the District of Columbia hereafter to repair or replace all water service pipes under public space in the District of Columbia.

Three: For a declaratory judgment declaring that (a) the practice, actions and/or regulations of the defendants, in requiring property owners in the District of Columbia to pay or incur any expense in connection with the repair or replacement to water service pipes under any public space in the District of Columbia, (required by D.C. Code §6-401 to be connected to the public water mains) are void and in violation of the laws of the District of Columbia, and (b) that such practice, actions and regulations deny the named plaintiffs and the class they represent the equal protection without due process in violation of the Constitution of the United States.

The exact position of the District of Columbia in shutting off water, requiring repairs or replacement of broken water service

pipes under the public street, and determining when and under what circumstances temporary water service shall be maintained during repairs and replacements, as well as whether and under what circumstances the water pipe on property owners' own property must also be replaced is that position expressed in a letter addressed "Dear Senator" and dated July 21, 1971, which reads as follows:

"Dear Senator McGovern:

This is in response to your inquiry of April 14, 1971, followed by a further inquiry dated July 6, 1971, requesting information relative to the financial responsibility of property owners, occupants or agents for the repair of lateral water feeds or service pipelines from public water mains on a public street, alley or other public space to private residential property. I regret the delay in responding to your letters.

"Basically, a property owner has a duty to provide at his own expense for the connection of his lot to a water main in public space. Act of May 19, 1896, 29 Stat. 125,

as amended (D.C.Code, Section 6-401 to 6-404, 1967 ed.). The lateral water feeder or service pipelines along with all of the material used to construct and install such pipelines remains the property of the lot owner and must be properly maintained by such property owner, occupant or agent.

"Further, Section 105-3 of the 1967 Plumbing Code of the District of Columbia provides that plumbing systems shall be maintained in a safe and satisfactory condition by the property owner or his authorized agent. In addition, Section 5 of Article 23 of the Police Regulations of the District of Columbia provides for the prevention of water waste on private property with the potential for harm to adjacent private property or public space and authorizes the termination of water services to such premises where there is water waste until satisfactory repairs or arrangements have been made for the repair of the source of the waste by the occupant, property owner or the authorized agent of the premises.

"The rationale behind the law in the District of Columbia imposing financial responsibility on property owners, occupants or agents for the repair of lateral water feeders or service pipelines from public water mains to private residential property is twofold; namely, that lateral water feeders or service pipelines from water mains in public space to

private residences belong to the property owner as an appurtenance to the realty and, that the property owner or occupant as a water consumer receives the water he uses at the street main and not at his property line or in his home as such. Accordingly, the property owner, occupant, or authorized agent must bear the expense of repairing such later water feeders or service pipelines.

"If you desire further information on this matter, please do not hesitate to call upon me.

Sincerely yours,

/s/ C. Francis Murphy
Corporation Counsel,D.C."

II. THE FACTUAL BACKGROUND

1. Definition of terms.

(a) "Water Main" is that pipe laid by the District of Columbia or the Corps of Engineers that carries the City's water supply under the public street (D.C. Code Title 43 §1501 et seq. and Police Regulation Article XXIII refers to the water as "Potomac Water").

(b) "Water service pipe" is that pipe connecting from the Water Main to the property owners water system at the property line. The water service pipe is under public space. This is also sometimes referred to as "lateral water feeder".

(c) "Water pipe" is the term used for that pipe bringing the water from the property line to the property owners' premises. Water pipe includes both the pipe from the property line to the premises as well as pipes inside the premises. Together all water pipes from the property line into the premises comprise the plumbing system or domestic plumbing system.

2. There are approximately 120,000 improved real properties in the District of Columbia with water service connections, all of whom are compelled to connect to "Potomac

Water" prior to inhabiting their dwellings or conducting business in the District. The District maintains the water mains, the public streets and sets the standards for the construction and maintenance of the streets, the mains and the water pipe service.

3. Defendants maintain the public streets of the District of Columbia, built and maintained out of the public funds of defendants and the United States of America.

4. Defendants provide and have provided, with the United States since at least 1896, the standards under which mains are built and maintained and have, from time to time, since that date and to the present time, set the standards under which these mains are built and maintained, including the material and size of the pipes, the depth of the pipes under the public streets and the conditions under which the pipes are

joined together, the conditions under which the earth, rocks and other material are compacted around the pipes, the allowable flow of water from the reservoirs and other sources into the system, ending with the discharge of water from the mains into the water service pipes which serve the class and the discharge of overflow out of the system.

5. Defendants have established, since at least 1896, the standards under which the public streets in the District of Columbia are built, repaired, maintained and replaced and have from time to time, since that date and to the present time, established the standards under which the public streets are built, repaired, maintained and replaced including the material, composition and carrying capacity of the surface and the depth of the installation of the mains and water service pipes. Further, defendants

set standards for all construction activity in or under the public streets, whether by the defendants or their agents and agencies, by public utilities or their agents or by property owners or their agents; and control over the construction and standards of sewers of all kinds; and set standards for weights of vehicular traffic of all kinds on the streets, including fire equipment, trucks, buses and other heavy load equipment, civilian, commercial, government, or military.

6. A subway system is being built along and below the public streets and there is in existence in the District of Columbia a streetcar track removal program.

7. The standards of material, size, location, connection, earth conditions, compaction and depth under the public space and the like for building, maintaining, replacing and repairing water service pipe to

and from the mains are and have been established by defendants. The work of building, maintaining, replacing and repairing water service pipes can be performed only under the standards set by the defendants and pursuant to a permit issued by the defendants. No one except the defendants may permit cutting into the public space for this purpose and the work can only be done by plumbers licensed by the defendants. How far from a water service pipe any other object or construction under the streets, such as sewers, vault space, public utility lines can be located or under which circumstances it can be built, repaired, maintained or replaced are under standards set by the defendants and pursuant to a permit issued by the defendants.

8. Progress in the City, such as vehicular traffic, subway construction, trolly track removal, private and public construc-

tion, as well as vehicular traffic, bus and truck routes and the like has increased in the past years by leaps and bounds.

9. The original system and standards of construction for public streets, mains and water service pipes in the 19th Century and the early part of the 20th Century, did not plan for the present day's stresses and strains on street use. Heavier traffic loads and heavier street uses of every kind place a burden on water service pipes markedly greater than was originally planned when the vast bulk of existing water service pipes were installed.

10. The defendants also prescribe the standards for streets and the amount and weight of traffic that flows over them and the stresses to which the streets may be subjected.

11. A property owner cannot protect himself from increases in the amount and

weight of vehicular traffic and the additional stress caused by vehicular traffic along bus and truck routes.

12. There is a proximate cause relationship between the increase in amount and weight of vehicular traffic of all kinds and the breaks and leaks in the water service pipes. The overwhelming cause for the breaks and leaks is the utilization of public space by augmented traffic that damages and breaks the water service pipes.

13. By law the water service pipes needed to bring water from the water main to property owner's plumbing system must be paid for by each property owner in order to connect to and use City Water (Potomac Water). Section 6-401-4, D.C. Code, requires this of all property owners and treats all property owners equally in this respect.

14. Whenever a water service pipe has

heretofore required maintenance, replacement or repair under the public space, defendants have required the property owner to maintain, replace and repair the water service pipe, in accordance with standards set by defendants, at the cost and expense of the property owner, even though the maintenance, replacement or repair takes place under the public space and is necessitated by causes and reasons entirely beyond the control of the property owner. An increasing number of members of the class will be required to pay or incur expenses every year hereafter for repair or replacement of water service pipes.

15. The defendants enforce these obligations against the property owner by threats to shut off the water supply to his property, to declare his home uninhabitable, to register a lien against his property, and to impose criminal sanctions.

16. During calendar year 1974, there were approximately 201 owners of property required to pay the costs to maintain, replace and repair water service pipes under the public space in the District of Columbia. During the calendar years 1971 to 1974 inclusive, the figures were:

Year	Number
1974	201
1973	317
1972	299
1971	284

17. The typical costs to repair and replace water service pipes under the public space including the cost of repair of the streets are rising and that these costs have ranged from $750.00 to in excess of $4,000.00 with an average of $2,000.00 per break.

18. Determination of when the water, having been turned off by the defendants, is turned back on, what work is to be done,

where the street excavation (including work on the property owner's property) is made, whether the pipe must be replaced and the cost of the work and the terms of payment, are substantially under the control of private contractors and plumbers licensed by the District of Columbia.

19. The defendants have not applied their alleged regulations and rules uniformly. They have in some cases during the period 1971-1974 made the necessary repairs under the public space at their expense, and postponed repayment by property owners until a later date, without threatening water shut-off, but have not offered equal treatment to approximately 700 other property owners similarly situated. This created two classes of unequal treatment of property owners under identical facts.

20. Some members of the class have had their water service pipes under the pub-

lic spaces repaired under D.C. Code §5-313 while others have not. The District implemented Section 5-313 without any definable standard as to when they will repair and replace water service pipes. The six members of the class who were given this benefit during 1973-4 were not considered by the Department of Housing's Administrator, Mr. Swanson, as "indigent".

21. Further, in the case of plaintiff Isabel Kelly, the District complied with the Court order to repair and replace at the District's expense, without regard to D.C. Code §5-313. This also created two classes of unequal treatment of property owners under identical facts.

22. The impact on the individual property owner is substantial, while the total cost of $250,000 to $1,000,000 per year for all cases is a relatively small item for the water fund. Further, substantial savings in

the total cost may be effected if the District of Columbia either does the work itself or contracts the work on a mass basis out to licensed plumbers on a competitive basis.

23. If the expense of all repairs were shared by all water users the additional costs would be approximately 30 cents per month or $3.50 a year for each water user. There is no financial burden on the District in paying for the repairs, since the cost will be reimbursed by the increased water bills.

24. All of the members of the plaintiff class are and will be subject to the risk that within a reasonable number of years, any one individual member of the class could be subject to the burden of maintaining, replacing or repairing under the public space, the water service pipe serving his or her premises. If the condition of a leak

is dangerous or otherwise presents itself as an emergency, the defendants may turn off the water without notice to the owner and occupier.

25. The members of the plaintiff class realistically fear sanctions including the shutting off of water service and declaration that the premises are unsanitary and not inhabitable; and the further penalty of imposition of expenses under D.C. Code §5-313, the sale of the premises for unpaid expenses or criminal conviction.

26. Both classes of plaintiffs include "indigent" and "non-indigent" persons by any definable or usual standard of "indigency".

27. The utilization of the streets by increasing vehicular traffic in the District of Columbia is for the public good and benefit. However, a small segment of the community is required to pay a dispro-

portionate share of the cost of this public good and benefit.

28. The District maintains a separate budget for the water fund consisting of both an operating and capital budget, and has adequate funds to provide for the remedy ordered by the Court or can, by legislative action, provide for the necessary funds by increases in the water rates.

29. The Court has considered all prior testimony given at the hearings leading to the First, Second and Third Preliminary Injunctions as though given again at the trial on permanent injunction and damages, including stipulations, answers to interrogatories, and matters as to which the Court took judicial notice.

30. All answers to interrogatories by the defendants are found as facts, without recital and repetition.

III. THE DEFENDANT'S RULES AND REGULATIONS

31. The defendants rely upon the following three regulations:

(a) D.C. Police Regulation XXIII (5), which reads:

> "Sec.5. No occupant of premises into which water has been introduced shall permit the same to run or waste unnecessarily from any water pipe, hydrant, cock, street washer or other fixture; or to overflow or flood the sidewalk or foot pavement, and thus become annoying or dangerous; or to permit a flow of water to be conducted into adjacent premises, and there be used, except in case of fire or other emergency; or, if any water pipe, hydrant, cock, hose connection, curbcock box or other fixture be found leaking, out of repair, or inoperable, and said occupant, owner or agent of the premises shall refuse or neglect to have the necessary repairs made, after due notification by Water Operations Division, or refuse admission to authorized representatives of the Water Registrar or Water Operations Division into the premises when in the official discharge of his duties, the supply may be terminated to said premises until satisfactory repairs or arrangements have been made to prevent such waste or unlawful use; and, in addition, the person so offending shall be liable to the fine provided in these regulations."

* * * *

(b) Section 400.7 of Title 12, D.C. Rules and Regulations for Department of Sanitary Engineering, promulgated by the Sanitation Department on September 5, 1972, the text of which is identical with Police Regulation XXIII, (5), supra.

(c) Section 105-3 of the September 13, 1971 Council of Governments' Model Plumbing Code, which reads:

> "Maintenance
> Plumbing systems subject to this Code shall be maintained in a safe and sanitary condition in conformity with the provisions of this Code by the owner or his authorized agent."

32. From and after November 3, 1967, the D. C. City Council did not enact Police Regulation XXIII(5) or Section 400.7 of Title 12, D.C. Rules and Regulations for Department of Sanitary Engineering ("Sanitary Engineering") or any like regulation.

33. (a) The defendants, at no time prior to the commencement of this litigation, ever relied upon, or mentioned, §105-3 of the Council of Governments' Model Plumbing Code as the basis of any claim against a property owner. All notices to property owners to repair water service pipes issued from and after August 21, 1971 relied solely and exclusively upon Police Regulations Article XXIII, Sec. 5. The form of notice sent reads as follows:

> "To Owner or Occupant:
> You are hereby notified that there is a leak or waste on the water service pipe or fixtures at premises
> _____
> _____
> You will please have the necessary repairs made by a registered plumber within _____ days in accordance with the PLUMBING REGULATIONS OF THE DISTRICT OF COLUMBIA.
> The water pipe and fixtures are part of your property and the POLICE REGULATIONS (ART. XXIII,SEC.5) provide that you must keep them in repair.
> In case repairs are not made within the above stipulated time you may be prosecuted for violation of said regulations.

/s/ Chief, Water Operations
Division
By_____"

(b) Section 105-3 of the September 13, 1971 Council of Governments' Model Plumbing Code adopted by reference by the D.C. City Council on August 1, 1972, if effective, is effective only as to an infinitessimal number of buildings built from and after that date. There is no evidence that any premises of plaintiff class of the First Class were built after August 1, 1972. Relatively none of the members of the Second Class had premises built after August 1, 1972.

(c) No provision of the Council of Governments' Model Plumbing Code mentions the problem dealt with in this litigation, namely, the allocation of the cost of repairs under the public space, not due to any act or default of the property owner, particularly including the cost of digging into, and backfilling and restoring public

streets.

34. The exact position being enforced by the District of Columbia (as described in more detail in Section I "Positions of the Parties") is that position expressed in a letter addressed "Dear Senator" and dated July 21, 1971.

35. The "Dear Senator" letter of July 21, 1971, page 2, supram was never promulgated as a "rule" under D.C. APA.

36. The testimony of Mr. Levesque with respect to reliance upon Regulation XXIII(5) is not accepted in view of the stipulation of reliance upon the interpretation contained in the "Dear Senator" letter and because the Trial Court did not accept as credible the changed position testimony. The testimony of Mr. Levesque with respect to the definition of "water pipe" and "water service pipe" is not accepted.

IV. THE CLASS ACTION

37. This Court has jurisdiction pursuant to Section 11-921 of the District of Columbia Code.

38. The complaint of North Washington Neighbors, Inc. and 56 other named plaintiffs as a class action against the District of Columbia and others has been designated by order of Court a class action, on behalf of two classes.

39. (a) One class is composed of approximately 700 property owners whose water service pipes have been broken under the street, sidewalk and adjoining public space in the District of Columbia (hereinafter "public space") from January 1, 1971 to the present time; who have been required by the defendants to pay all the costs of repair or replacement of water service pipes under the public space (as well as any costs involved from the water meter to the inside plumbing system where required

by the District of Columbia under the D.C. Plumbing Code because of a break or leak under the public space) as well as the cost of excavating the public space and resurfacing it, under compulsion from the defendants that their water service would be cut off or they would be prosecuted for violation of the City Police Regulations; and who sue to secure reimbursement of the cost and expense of the same, attorneys' fees and interest. This class is sometimes referred to as the "first class".

(b) The second class is composed of approximately 120,000 property owners (including the first class) whose water service pipes may in the future be broken under any public space in the District of Columbia; who seek a declaratory judgment declaring that the acts, practices and regulations of the defendants in requiring members of the class to pay or incur expense

in connection with repairs or replacements following a break in water service pipes under a public space are void, in violation of the laws of the District of Columbia and unconstitutional in violation of the Constitution of the United States; and who seek a preliminary and permanent injunction against the defendants from the above-described practices as well as a mandatory injunction to require the District of Columbia hereafter to repair or replace all water service pipes which break under public space (and other expenses related thereto) at the cost and expense of the District of Columbia. This class is sometimes referred to as the "second class".

40. Members of the two classes, approximately 120,000, on behalf of whom plaintiffs sue (hereinafter "the class"), are so numerous that joinder of all members is impractical. However, all questions of

law or fact affecting the rights of the members of the class are common to all members of the class. The claims of the named plaintiffs are typical of the claims of all members of the class, and the plaintiffs fairly and adequately represent and can protect the interests of all members of the class. Prosecution of separate actions by members of the class would create a risk of inconsistent or varying adjudications or adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members of the class not party to the litigation. Defendants have acted on grounds generally applicable to all members of the class. The questions of law or fact, common to the members of the class, predominate over any questions affecting only individual members, and a class action is superior to other available methods for

the fair and efficient adjudication of the controversy.

41. The Court on January 17, 1975, certified the action as a Class Action under Rule 23(c) of the Civil Rules of this Court; on August 15, 1975, the Court closed the class.

42. The cause was assigned to Judge Theodore Newman, Jr. for all purposes.

43. A First, Second and Third Preliminary Injunction were issued, respectively, on December 6, 1974, December 16, 1974 and January 21, 1975.

44. Trial on the merits was held in open Court, without a jury, on November 5 and 6, 1975.

45. The plaintiffs have fully established the material allegations of their complaint.

46. Paragraphs 1 to 45, supra, are the Findings of Fact of the Court.

CONCLUSIONS OF LAW

1. This Court has jurisdiction pursuant to Section 11-921 of the District of Columbia Code.

2. Under the provisions of Reorganization Plan No. 3 of the District of Columbia, the power under D.C. Code §43-1503 was transferred from the Commissioner, now Mayor, to the D.C. City Council effective November 3, 1967.

3. The D.C. City Council did not enact Police Regulation XXIII(5) from and after November 3, 1967, the date Reorganization Plan No. 3 went into effect.

4. Section 400.7 of Title 12 D.C. Rules and Regulations for Department of Sanitary Engineering was never enacted by the D.C. City Council at any time.

5. Neither Regulation XXIII(5) nor 400.7 was validly effective after November 3, 1967. The publication on July 27, 1970

of Police Regulation XXIII(5) by the Commissioner under the D.C. APA was a legal nullity as was the publication of the said Sanitary Regulation Section 400.7 on September 5, 1972 by the Commissioner.

6. Regulations XXIII(5) and 400.7 are, in no case, authority for imposing costs on the property owners. They do not state who will make repairs or bear the cost or under what circumstances, nor do they impose costs of street excavation and resurfacing on the property owners.

7. The term "water service pipe" (or the term "lateral water feeders") as construed by the Court, and as generally construed by Courts in other jurisdictions means that portion of the means of carrying water under public space from the "main" to the property line. Since neither Police Regulation XXIII(5) nor Sanitary Regulation 400.7 contains the phrase "water service

pipe", these sections can, in no event, apply to "water service pipes" and therefore are intended to deal only with leaks on the premises of the occupant or owner of the property, e.g., to water running or waste emanating from a "water pipe", etc. on the owner or occupant's property and not in public space.

8. Neither the D. C. Code nor the regulations have the effect of requiring members of the plaintiff class to repair or replace their broken or leaking water service pipes under public space or to incur related expenses or obligations.

9. Section 105-3 of the Council of Governments' Model Plumbing Code is not applicable.

10. The exact position being enforced by the District of Columbia (as described in more detail in Section I "Positions of the Parties") is not enforceable as a mat-

ter of law, either by the D.C. Code, by any regulation promulated by the District of Columbia (whether enforceable or not), or the "Dear Senator" letter of July 21, 1971 or the interpretation of Mr. Levesque (even if accepted and credible).

11. Defendant, District of Columbia, did not on or after October 21, 1969, publish under D.C. Code §1-1501 et seq., D.C. APA, any "rule" requiring repair and replacement of water service pipes.

12. (a) The "Dear Senator" letter of July 21, 1971 or its contents in another form was not published as a rule in accordance with D.C. APA D.C. Code §1-1501 et seq.

(b) This "position" is a "rule" and the process of making it "rule-making" under the provisions of §§1-1502(6) and (7) as it is "the whole or any part of any Commissioner's. . .or agency statement of

general or particular applicability and future effect designed to implement [or] interpret. . .law or policy. . ." [§1-1502 (6) D.C. Code] As the "position" has never been published under the provisions of the D.C. APA it is an invalid and unenforceable "rule". The enforcement of the invalid "rule" is a violation of the Fifth Amendment to the Constitution of the United States. Junghans v. Department of Human Resources, 289 A.2d 17 (1972), D.C. v. Green, 310 A. 2d 848 (1973).

(c) The interpretation of Mr. Levesque (even if accepted and credible) is a "rule" and the process of making it "rule-making" under the provisions of §§1-1502(6) and (7) as it is "the whole or any part of any Commissioner's. . .or agency statement of general or particular applicability and future effect designed to implement [or] interpret law or policy. . ." [§1-1502(6)

D.C. Code] As the "interpretation" (even if accepted and credible) has never been published under the provisions of the D.C. APA it is an invalid and unenforceable "rule". The enforcement of the invalid "rule" is a violation of the Fifth Amendment to the Constitution of the United States. Junghans, supra; Green, supra.

13. Defendants owe the plaintiffs the duty of due care. It has been shown that the breaks are the result or proximate result of acts permitted by the City, and the plaintiffs are entitled to recovery for the losses and an injunction against paying for future breaks.

14. The City has set the standard for the pipes, for their placement under the public space, for the vehicular and other traffic and weight of such traffic permitted on the City streets, for the bus lines and for the truck routes, which caused

vibrations and pressures on the city soil. These combined effects have caused injury in the form of breaks, due as the result or proximate result of the City's actions, and this amounts to negligence on the part of the City.

15. Since the defendants control the standard by which the streets are constructed and the standards for both type and placement of the water service pipes, and since the defendants have permitted increases in vehicular and other traffic, and increases in the weight of traffic; and since this is progress for the benefit of all citizens; and since the water service pipes are under the exclusive control of the defendants and without the control of the property owners; and since the defendants require connection with City water and do not permit the property owner to dig his own well; and since all property owners

are vulnerable to loss and damges and the benefits to all the inhabitants as a whole fall as an unequal burden on some members of the community; and since the defendants have the power to levy a water tax and can, for a few cents a month, provide the cost of repair, maintenance and replacement and avoid all unequality of burden; the plaintiffs, on the basis of the facts set forth in Paragraphs 1 to 45, supra, and the conclusions set forth in Paragraphs 1 to 13, supra, and in this Paragraph 14, are entitled to the relief sought, as set forth in the Decree which follows:

16. The Court takes judicial notice of D.C. Codes §§6-401 through 404 and §43-1503.

It is therefore by the Court this day of December, 1975,

ORDERED, ADJUDGED, DECREED and DECLARED:

1. The practice, action and regulations of the defendants requiring members of the plaintiff Class to repair or replace any water service pipe broken or leaking under public space in the District of Columbia (including where appropriate the water meter and, if required, to repair or replace the serviceable water pipe from the property line to the inside plumbing system; including the cost of excavation of the street and water service pipe and water pipe and, the refilling of all excavations and resurfacing of applicable streets as well as the expense of anything necessarily related thereto (hereinafter collectively referred to as "related expenses") is void as a matter of law and in violation of the Constitution of the United States.

2. Insofar as the following regulations of the District of Columbia require

members of the plaintiff Class to repair or replace any water service pipe broken or leaking under public space in the District of Columbia and to incur related expenses, the following regulations are and have been void as a matter of law and in violation of the Constitution of the United States from and after August 21, 1971:

(a) D.C. Police Regulation XXIII (5);

(b) Section 400.7 of Title 12 D.C. Rules and Regulations for Department of Sanitary Engineering;

(c) The official statement of position of the defendants recited in the "Dear Senator" letter dated July 21, 1971;

(d) The "interpretation" of Mr. Levesque; and Section 105-3 of the Council of Governments' Model Plumbing Code is inapplicable.

3. Each and every member of plaintiff Class Number One, who, having from and after August 21, 1971 and up to the date of this Order, suffered a break or leak in a water service pipe under the public space in the District of Columbia and who has paid or incurred the expense of repairing or replacing such water service pipe break or leak, including related expenses, is awarded a judgment against the District of Columbia, as of the date of incurring the said expense, with interest at 6% per annum from the date of incurring the said expense to the date of payment. The names, addresses, dates, and exact amount of each separate judgment shall be determined as hereinbelow provided.

4. Each and every member of both plaintiff classes who, from and after the date of this order and up to the date of compliance with this Order, suffers a break

or leak in a water service pipe under the public space in the District of Columbia and who pays or incurs the expense of repairing or replacing such water service pipe break or leak, including related expenses, will, by subsequent order, be awarded a judgment against the District of Columbia, as of the date of incurring the said expense to the date of payment, unless the District has complied with the mandatory injunction provided for hereinbelow and has replaced or repaired said water service pipes at the sole cost and expense of the District of Columbia without any claim or demand for reimbursement. The names, addresses, dates and exact amounts of each separate judgment shall be determined as later ordered by the Court.

5. The defendants, their agents, servants, employees, attorneys and all persons in active concert or participation with

them are, and they hereby are, restrained and enjoined permanently from and after the date of this Order from all of the following acts in the case of the break or leak in any water service pipe under public space in the District of Columbia:

(a) Issuing any notice to a member of plaintiff class to repair or replace the same;

(b) Shutting off the water service to a member of the plaintiff class for failure to make such repair or replacement at his own expense;

(c) Requiring members of the plaintiff Class to repair or replace the said water service pipes or to pay or incur the expense of the same; and requiring members of the plaintiff Class to pay or incur related expenses or to perform acts related to the repair or replacement of said broken or

leaking water service pipes.

(d) Prosecuting members of the plaintiff Class by fine or imprisonment or declaring their premises uninhabitable or unsanitary by reason thereof; and

(e) Any other acts detrimental to members of the plaintiff Class arising therefrom.

6. The defendants be, and they hereby are, ordered and directed, at the sole cost and expense of the District of Columbia, from and after the date of this Order, in the case of a break or leak in any water service pipe under public space in the District of Columbia, to maintain water service to the members of the plaintiff Class; with all deliberate speed to repair or replace the said broken or leaking water service pipe under the public space, in a manner conforming to the then relevant D.C.

Plumbing Code; and to perform such other and related acts as may be necessary including, but without limiting the generality of the obligation, any and all street excavation and refilling, any repair or replacement of the water meter and the water pipe, if required by the District of Columbia, and any and all resurfacing of streets and sidewalks; all of the foregoing to be performed at the cost and expense of the District of Columbia.

7. Plaintiffs may submit their request for costs and reasonable counsel fees at a time to be determined by the Court.

8. The Court retains jurisdiction for the purpose of such further Orders as may be necessary.

9. The effective date of this Order is stayed for five (5) whole Court days only following the date of the signing of this Order for the purposes of permitting

the defendants time, if they so elect, to apply to the D.C. Court of Appeals for a stay of this Order pending an appeal by defendants.[1/]

/s/ Theodore R. Newman, Jr.
THEODORE R. NEWMAN, JR.
JUDGE

Date: December 10, 1975

Time: 9:00 A.M.

Approved as to form:

Corporation Counsel, D.C.
Attorney for Defendants

1/ Defendants have applied for and been denied a stay of this Order by the Trial Court.

DISTRICT OF COLUMBIA
COURT OF APPEALS

Mar 8 1977

Alexander L. Stevas
Clerk

No. 10301 January Term, 1977

DISTRICT OF COLUMBIA,
A Municipal Corporation, ET AL.,

Appellants,

v. 7481-74

NORTH WASHINGTON
NEIGHBORS, INC., ET AL.,

Appellees

BEFORE: Kelly, Kern and Gallagher, Associate Judges

O R D E R

On consideration of appellees' petition for rehearing, it is

ORDERED that appellees' petition is denied.

PER CURIAM:

COPIES TO:

Honorable Theodore R. Newman, Jr.
Chief Judge, District of Columbia Court
of Appeals

Clerk, Superior Court of the District
of Columbia

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